In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1390

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner

versus

ALLEN CLAIBORNE, ET ALS.,
Respondents,

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS, AND BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS, ALLEN CLAIBORNE, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS, ALLEN CLAIBORNE, ET AL IN OPPOSITION

REASONS FOR DENYING WRIT

1) Petitioner would have this Court resolve imagined conflict in decisions of various Courts of Appeal. It cites this Court's decision in Johnson vs. Railway Express Agency, 421 U.S. 454, 95 S. Ct. 1776, 44 L.Ed.2nd 295 (1975), but does not mention this Court's expression on the present subject. There this Court at 95 S.Ct. 1719 found as follows:

> ". . .An individual who has established a cause of action under Sec. 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances punitive damages."

The Court went on to express the opinion that the enactment of Title VII in no way affected remedies under 42 U.S.C. Sec. 1981, by saying:

> "We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of §1981 action while an EEOC claim is pending.
>
> We generally conclude, therefore, that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct and independent."

The conflict suggested by petitioner results from the decisions of the Sixth Circuit in *E.E.O.C. vs. Detroit Edison Company*, 515 F.2d 301 (1975) and the Tenth Circuit in *Pearson v. Western Electric Co.*, 542 F.2d 1150 (1976). It appears that *Edison* did not even consider the above language of this Court in *Johnson* and while *Pearson* did mention and cite from *Johnson*, it did so only to establish that one may not seek punitive damages under strictly Title VII actions.

2) Petitioner's second reason for issuance of a Writ of

Certiorari is the failure of the District Court to assess damages against the union. Respondents, Allen Claiborne, et al take no position on this issue.

3) The third issue concerns a chart presented by petitioner at the trial of this matter indicating how many individuals received promotion from July 2, 1965 through the date of trial and its contention that there were only a given number of vacancies and that only a certain number of black men could have possibly received promotions. Petitioner continues to contend that respondents, Allen Claiborne, et al have never challenged the accuracy of the flow chart. In the District Court and in the Court of Appeal, respondents, Claiborne, et al have successfully challenged the very concept of a flow chart. We have argued below that a flow chart has no application unless one proves real vacancies. We demonstrated earlier that of 102 white men who remained with the company, 101 received promotion to the position of carmen which is the subject promotion petitioner refers to. We have proven that black men could do and were doing the same work as white carmen. Petitioner had limited vacancies only because there were a limited number of white men who needed promotions. We demonstrated that had there been more white men needing promotions, there would have been more vacancies. The fifth Circuit adequately summed up this conclusion, thusly:

> "In their (the employee's) and the trial court's view, work assignments at Mays Yard did not reflect a fixed number of slots to be filled by members of each of several well-defined drafts. Rather, carmen, apprentices, and helpers did essentially similar work; whites doing this work were promoted to carmen's rank upon completion of a period

of apprenticeship and blacks were not, even when qualified to do and doing carmen's work, solely because of their race. Based on the railroad's treatment of whites, that is, the creation of a carmen's slot for every qualified white person, the "rightful place" of each black employee was to be a carman on the day he became fully qualified. This interpretation by the trial court accurately reflects the "rightful place" principle, and is based on factual conclusions that are not clearly erroneous." (A-9);

and;

"Finally, the employer's effort to "flow-chart" the vacancies in the carmen's craft since 1966 belies any historical certainty inherent in that approach. The proffered flowchart indicates that between 1965 and 1969, 15 vacancies in the rank of carmen occurred because of resignation or retirement. Yet 27 employees were promoted to carmen's positions in that time. The first black employee so promoted was upgraded on August 30, 1967, after the EEOC complaint from which this action arose was filed. Twenty-two persons were promoted before any plaintiff in this case was upgraded. Given these facts, the railroad's assertion that the flowchart presents a picture of actual vacancies based on resignations, retirement, or work availability is merely a competing hypothesis that does not require reversal of the trial court's approach, which is based on substantial evidence." (A-12)

4) The fourth reason for petitioner's request that a Writ of Certiorari issue concerns the fact that there were some laborers senior to plaintiffs herein who were not promoted and who should have been promoted. Counsel for respondents, Claiborne, et al, was unable to find any briefing of this issue in the briefs submitted to the District Court and to the Fifth Circuit by petitioner. Moreover respondents' counsel does not recall ever having heard this argument raised orally before any of the courts in question. It appears that a new issue is presented to this Court, an issue on which petitioner seeks redress without having introduced all the necessary facts prerequisite to such issue. For instance, petitioner may not know that some of the forty or so laborers who were not plaintiffs in this suit are women who function more or less as maids cleaning the interior of railroad cars. Also, there was no proof that the men who were laborers wanted to be or were able to function as carmen (although this writer believes that it is a simple process for them to be so trained.) In short, petitioner wishes to argue in the Supreme Court without having laid its factual basis in the District Court below.

However, assuming this Court permits petitioner to present this issue at this time, it is the position of respondents, Allen Claiborne, et al, that the question of these forty or so persons is not different than that issue expressed above in paragraph 3 relative to the flow chart. Since carmen vacancies were created for any and all white persons who came into the company over a period of time, these black laborers should have been made carmen. Just as there were no set number of vacancies with respect to the seven laborers, there should have been no set number of vacancies with respect to the older laborers who are not a part of this lawsuit. Petitioner

has not proven that only a set number of positions would have been available and that the seven (7) respondent laborers would not have been promoted absent discrimination.

Lastly, petitioner are not really concerned with protecting the older laborers. In all probability if these laborers were to intervene in this action seeking promotion to the position of carmen and back wages, petitioner would be the first to oppose such an action.

Petitioner should not be excused from redressing one wrong by showing that they have committed another wrong for which no redress has been sought.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

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CERTIFICATE

I hereby certify that three copies of this Memorandum in Opposition to the Petition for a Writ of Certiorari were mailed, postage prepaid, to counsel of record for all parties, this 16th day of May, 1979, as follows: H. Martin Hunley, Jr., 1800 First National Bank of Commerce Bldg., New Orleans, Louisiana, 70112, Attorney for Illinois Central Railroad; Victor H. Hess, Jr., 1411 Decatur Street, New Orleans, Louisiana, Attorney for Co-Defendant, International Brotherhood of Firehood and Oilers, Helpers, Roundhouse and Railway Shop Laborers; and; Donald W. Fisher Esq., 740 National Bank Building, Toledo, Ohio, 43604, Attorney for Co-Defendant, Brotherhood of Railway Carmen of the United States and Canada.

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